

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 783

UNITED STATES OF AMERICA

v.

DAVID THOMAS HEALY, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA**

RESPONSE TO MOTION TO DISMISS APPEAL

There is no merit to respondents' motion that the government's appeal be dismissed as untimely filed. Although the district court dismissed both counts of the indictment on September 17, 1962, a petition for rehearing was filed on October 17, 1962, and the order denying this petition was filed on November 8, 1962. The notice of appeal filed on December 5, 1962, within 30 days after the denial of the petition for rehearing, was timely. See Rule 37(a)(2), Fed. Rules Crim. Proc.

It is well settled that where a district court entertains a petition for rehearing, the judgment of the

court as originally entered does not become final until the denial of rehearing, and the time to appeal runs from the date of the denial of rehearing. *Wayne Gas Co. v. Owens Co.*, 300 U.S. 131, 137-138; *Bowman v. Loperena*, 311 U.S. 262, 264-266; and cases cited.¹ This rule is probably inapplicable where the petition for rehearing is filed after the time for appeal has expired, merely for the purpose of extending the time for appeal. See *Wayne Gas Co. v. Owens Co.*, 300 U.S. 131, 136. That principle, however, has no application here. The government's petition for rehearing was filed within the time for appeal (within 30 days after the original judgment) and was filed to call the attention of the district court to considerations, including a controlling decision of this Court, which the government believed conclusively showed the error in the court's original judgment.

It is therefore respectfully submitted that the motion to dismiss the appeal should be denied.

ARCHIBALD COX,
Solicitor General.

MARCH 1963.

¹ *United States v. Apex Distributing Co.*, 270 F. 2d 747 (C.A. 9), holding that the government could not appeal under 18 U.S.C. 3731 from the dismissal of a criminal case because of the government's refusal to comply with pre-trial discovery orders, has no bearing on the situation here where the appeal does clearly lie under the Criminal Appeals Act and the only issue raised is timeliness.